Assumed —
Judge Davis
14-531
Davis Docket

14-531

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~441~~ 225

THOMAS P. MORGAN AND GEORGE RHINEHART, APPELLANTS,

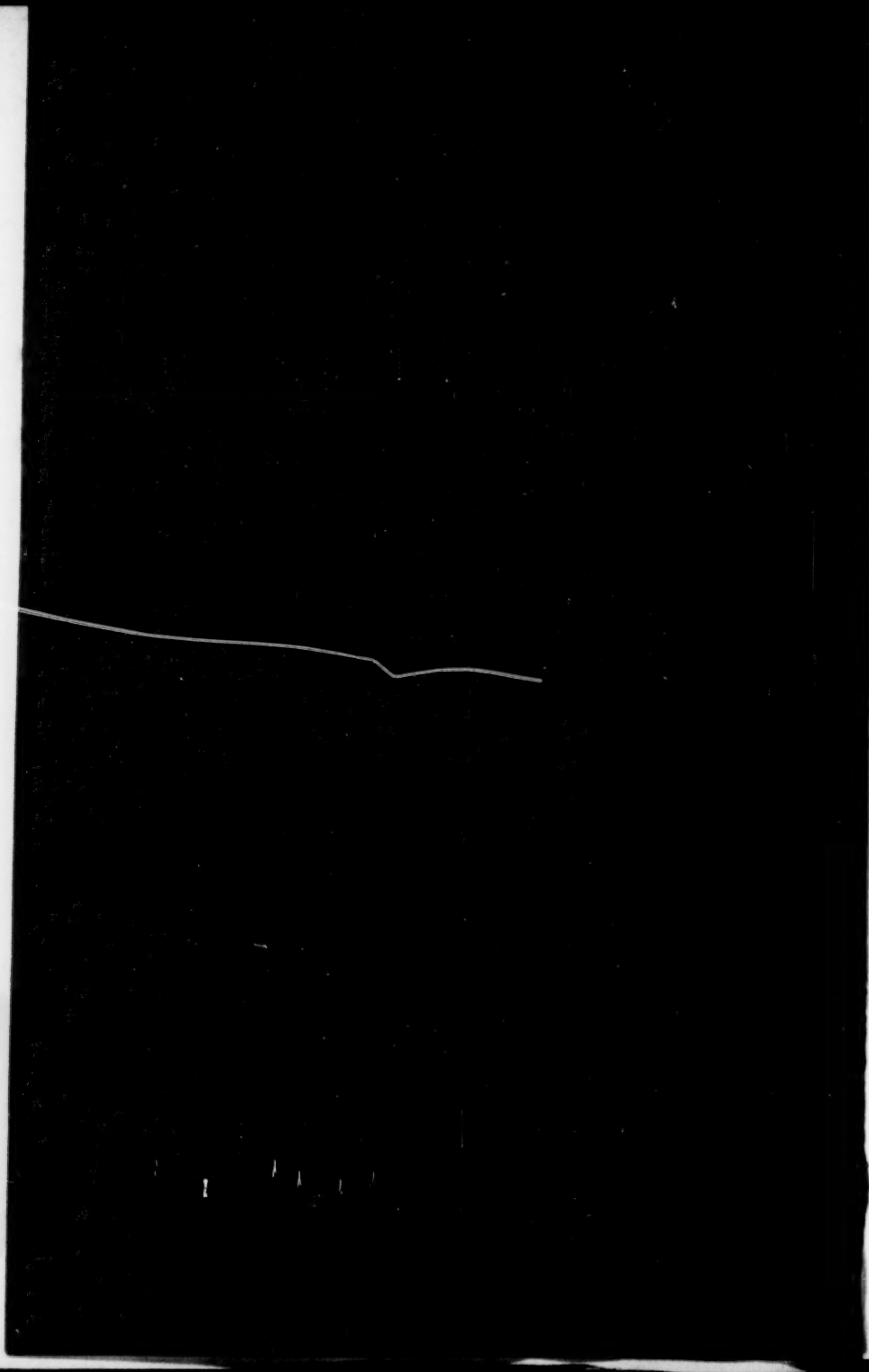
vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

**FILED DECEMBER 22, 1870.**

Dec. 1871



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1 United States Court of Claims. December term, 1868.

THO'S P. MORGAN AND GEORGE RHINEHART
*vs.*
THE UNITED STATES,

To the honorable the judges of the Court of Claims:

Your petitioners, Tho's P. Morgan and George Rhinehart, citizens of the United States, and residents of the District of Columbia, respectfully represent—

That, on the 1st day of March, 1865, they were the owners of the steamer called the "Tappahannock;" that, on the said day, the said vessel was chartered to the United States, at the rate of one hundred and eighty-two dollars and twenty-five cents per day; that a regularly-executed charter-party was entered into by and between said Tho's P. Morgan and George Rhinehart, for themselves, through their agent, E. G. Comstock and Captain John R. Jennings, A. Q. M., U. S. A., for the United States, a copy of which is hereto attached and made part hereof, marked "A." Your petitioners further allege, that the said vessel performed all the stipulations of said charter-party during the whole time of service of said vessel; that, on the 25th day July, A. D. 1865, the said vessel, then lying at the port of Brazos Santiago, Texas, was ordered by Captain J. E. Scott, A. Q. M. U. S. A., to receive on board a load of troops and Government stores, and proceed to New Orleans, Lousiana; that, after receiving on board said
2 troops and cargo, and a pilot provided by the Quartermaster's Department, she proceeded on her voyage. A Government steamer, with a Government pilot on board, was sent to assist said vessel in crossing the bar lying off the mouth of the harbor of said port; that, in endeavoring to cross the bar, the said vessel grounded, and, in consequence of the heavy sea running at that time, the said vessel struck and thumped heavily, and in the effort to pull said vessel over the bar, the hawser of the tug parted, and the said vessel fell around into the trough of the sea; but by using her power, and under a heavy pressure of steam, she finally succeeded in getting clear of the bar, and returned to the said Brazos Santiago, and anchored. The captain of the said steamer "Tappahannock" and the pilot, duly reported the facts to the quartermaster, the pilot stating that there was not water enough on the bar by a foot to float the said vessel; that, notwithstanding the fact that there was not sufficient water on the bar to float said vessel, the quartermaster still insisted upon another attempt being made to get the said vessel to sea; that the captain at once proceeded to carry out the order of the said quartermaster, and in so doing the said vessel grounded again on the bar, striking and laboring heavily, so much so, that her engine became completely disabled; that the tug which was assisting her succeeded, after one and a half hours' hard labor in finally forcing the said vessel over the said bar; that after reporting the facts to the said quartermaster, the said vessel was ordered to proceed on her voyage in tow of the Government transport "Dudley Buck;" that, on the 4th day of August, A. D. 1865, the said steamer arrived at her port of destination, and reported to Capt. G. A. Norton, Q. M., at New Orleans, who gave permission for the captain to repair his vessel. And your petitioners further state that, owing to the great want of transportation then existing at said port, only temporary repairs were made upon said vessel: that, on the 8th day of November following, it was found absolutely necessary for the safety of the vessel, to haul off, and permanently make

good the damages sustained by the disaster met with in crossing the said bar at Brazos Santiago, on the 24th day of July before mentioned; that, from the said 8th day of November until the 4th day of
3 December, A. D. 1865, men were working night and day in making said last-named repairs; and your petitioners say that, from the 5th day of August, 1865, until the 25th day of August, 1865, said vessel was undergoing said temporary repairs; that the whole period of time consumed in making the repairs, temporary and permanent, before mentioned, was forty-five and one-half days; that all said time was necessary to complete said repairs, and put said vessel in proper condition for service; that, during the entire period of forty-five and one-half days aforesaid, the United States refused, and has since refused, although application has been made to the proper Department of the United States Government, to pay your petitioners for the time lost in said repairs. Your petitioners further say that, by the terms of said charter party, as well as every principle of justice and right, the United States is liable to your petitioners for the charter-rates per day for the time so consumed in said repairs, which your petitioners allege to be the sum of eight thousand two hundred and ninety-two dollars, and for this amount they ask judgment. Your petitioners further say that the total cost of both temporary and permanent repairs aforesaid amounted to the sum of six thousand eight hundred dollars and seventy-nine cents, which your petitioners were forced to incur, and which were necessary; and that of this amount, the United States paid your petitioners only the sum of four thousand two hundred and eighty-three dollars and twenty-one cents, leaving, as your petitioners allege, the further sum due your petitioners of two thousand six hundred and seven dollars and fifty-nine cents, for which they ask judgment. Your petitioners aver that they have at all times borne true allegiance to the United States Government, and have never given aid or comfort to the rebellion against said Government. That application has been made to the proper Department for the amount herein claimed. Your petitioners, therefore, by reason of these premises, ask judgment for the sum of ten thousand eight hundred and ninety-nine dollars and ninety-six cents.

CHIPMAN, HOSMER & CO.,
*Solicitors for Petitioners.*

4 CITY OF WASHINGTON,
*District of Columbia, ss:*

George Rhinehart, being duly sworn, on oath, deposes and says that he is one of the petitioners named in the foregoing petition; that no assignment of the claim therein stated has been made, except as in said petition stated; that the petitioners are justly entitled to the amount therein claimed, after allowing all just credits and offsets; and that he believes the matters and things in said petition are true.

GEO. RHINEHART.

Subscribed and sworn before me this 10th day of December, A. D. 1868.
[L. S.] JOHN F. CALLAN,
*Notary Public.*

EXHIBIT "A."

This charter-party of affreightment, made this first day of March, in the year one thousand eight hundred and sixty-five, between C. G. Com-

stock, agent for owners of the steamer or vessel called the "Tappahannock," of Philadelphia, Pennsylvania, of the burthen of registered tons, or thereabouts, at present lying in the harbor of Philadelphia, and commanded by , of the first part, and Captain John R. Jennings, U. S. A., for the United States, of the second part, witnesseth: That the said party of the first part does and doth hereby grant and to freight let, and the said party of the second part does and doth hereby to freight take, the steamer Tappahannock, to load at Philadelphia, Pennsylvania, or elsewhere, and proceed on the voyage hereinafter mentioned, (always reserving sufficient room for the stowage of the vessel's cables and materials, and accommodation of the officers and crew, and, if a steam vessel, for necessary supply of coal.) And thereupon the party of the first part, and his heirs, executors, administrators, and assigns, doth hereby covenant, grant, and agree, to and with the said party of the second part, that the said vessel now is, and shall be, kept and maintained during the whole of the voyage mentioned in this contract, tight, staunch, strong, and well and sufficiently manned, victualled, tackled, apparelled, and ballasted, and furnished in every respect fit for merchants' service, at the cost and charge of her owners. (The time lost in consequence of any deficiency in these respects not to be paid for by the United States.) And shall, on the first day of March, 1865, be ready to receive on board, whenever tendered alongside by the Quartermaster U. S. Army, his factors or assigns, such troops, men, animals, and supplies, or cargo as they shall order and direct, and the said vessel can conveniently stow and carry. And when laden shall proceed, with the first good opportunity, and without delay, from the port of Philadelphia, or elsewhere, and proceed direct to such ports and places as ordered by the Quartemaster U. S. Army, and deliver cargo to the Qquartermaster, or duly authorized agent of the Quartermaster's Department. All pilotage and port charges will be paid by the United States after leaving the port of Philadelphia. All cargo to be received and delivered within reach of the said vessel's tackles. The said vessel snall deliver her cargo in good order and condition, (the dangers of the seas, fire, and navigation, and the restraints of princes and rulers being always excepted.) The war risk to be borne by the United States. The marine risk to be borne by the owners.

In consideration whereof the said party of the second part does agree to employ the said vessel on the voyage or voyages aforesaid; and that, as a freight or hire of the said vessel during the term of this contract, he will pay, or cause to be paid, the full and just sum of one hundred and eighty-two dollars and twenty-five cents per day for each and every day said vessel may be employed, and will furnish all fuel necessary for the navigation of the said vessel, if a steamer, until the said vessel is returned to the said party of the first part in Philadelphia, in the same order as when received, ordinary wear and tear, damage by the elements, collision at sea and in port, bursting of boilers, and breakage of machinery excepted; to become due, owing, and payable in the manner and form following, that is to say, payable to the order of Thomas P. Morgan, at the Quartermaster's Office of the United States, at Washington, D. C.. monthly, upon presenting certificates of the duly authorized agent of the Quartermaster's Department that the said vessel has faithfully performed her part of this contract.

The said vessel is valued and appraised at the sum of sixty thousand dollars, and should she be retained so long in the service of the United States that the money paid and due on account of said charter (deducting therefrom the actual cost of running and keeping in repair the said

vessel during the said time, together with a net profit of thirty-three per cent. per annum on said appraised value) shall be equal to said appraised value, then the said vessel shall become the property of the United States without further payment, except such sum as may then be due on account of the services of the said vessel, rendered under the said charter.

And further, if at any time during the continuance of this charter, the United States shall elect to purchase the said vessel, then they shall have the right to take her at the appraised value at the date of charter, and all money then already paid and due on account of said charter (deducting therefrom the actual cost of running and keeping in repair the said vessel during the said time, together with a net profit of thirty-three per cent. per annum on the original appraised value) shall apply on account of the said purchase.

This charter shall go into effect at 6 o'clock p. m., of the 1st day of March, 1865, and shall continue in force as long as said vessel may be required by the United States W. Department.

No member of Congress shall be admitted to any share or part of this contract, or any benefit to arise therefrom.

In witness whereof the said parties to these presents have hereunto interchangeably set their hands and affixed their seals on the 1st day of March, 1865.

(Executed in quintuplicate.)

E. G. COMSTOCK, [L. S.
*Agent.*
JOHN R. JENNINGS, [L. S.]
*Captain A. Q. M.*

Signed, sealed, and delivered in the presence of—
GEO. H. GREENLEAF.
JAMES G. WILSON.
H. C. POTTS.
E. B. TOWNSEND.

6 In the United States Court of Claims. December term, A. D. 1868

THOMAS P. MORGAN & GEORGE RHINEHART
*vs.*
THE UNITED STATES. } No. 3707.

And the said defendants, by their attorney general, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of $10,899 96, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

L. LYLE DICKEY,
*Assistant Attorney General.*

7 In the Court of Claims.

THOMAS P. MORGAN, ERWIN G. COMSTOCK, Lester D. Fuller, Clement L. Hughes, and George L. Savage
*vs.*
THE UNITED STATES.
No. 3707.

*Amended petition.*

To the judges of the Court of Claims:

Your petitioners, Thomas P. Morgan, Erwin G. Comstock, Lester D. Fuller, Clement L. Hughes, and Joseph L. Savage, citizens of the United States, respectfully show to your honors—

That, on the 1st day of March, A. D. 1865, your petitioners, Morgan, Comstock, Fuller, and Hughes, were owners of a certain steamship called the Tappahannock, in the following shares, viz, Morgan and Comstock each of one-sixth, and Fuller and Hughes each of one-third; that, on or about the 27th day of March, A. D. 1865, the said Fuller sold his interest in the said steamship to the said Morgan and Comstock in equal shares; and on or about the 1st day of May, A. D. 1865, the said Hughes sold his interest in the said steamship to Joseph L. Savage, by which several transfers the entire interest in the said steamship became vested in your petitioners, Morgan, Comstock, and Savage, in equal shares.

8 That by a charter-party made the first day of March, in the year eighteen hundred and sixty-five, between your petitioners, acting by their agent, Ely Comstock, and the United States, acting by their agent, John R. Jennings, an assistant quartermaster of the Army of the United States, your petitioners hired to the United States their steamer called the Tappahannock, then lying at the port of Philadelphia, Pennsylvania, for a voyage to such ports and places as ordered by the Quartermaster of the United States Army. And the United States, among other things, agreed to pay as hire of the said vessel the sum of one hundred and eighty-two dollars and twenty-five cents for every day the vessel should be employed under said charter, and to furnish fuel for the navigation of the vessel; and your petitioners, on their part, agreed, among other things, that they would keep and maintain the said vessel tight, staunch, strong, and well and sufficiently manned, victualed, tackled, appareled, and ballasted, and furnished in every respect fit for merchant service, during the voyage in said charter-party mentioned; and the time lost in consequence of any deficiency in these respects, it was agreed, should not be paid for by the United States.

And the parties respectively further agreed to do certain other things not material to be set forth here, all of which together with the stipulations hereinbefore referred to, will more fully and at large appear by reference to the said contract of charter, a copy of which is hereto appended, marked Exhibit A.

And your petitioners further show, that the said vessel was accepted by the United States for service on the 1st day of March, 1865, at 6 o'clock, p. m., and continued in service until the 2nd day of January, 1866, and during that period the respective parties performed all the matters and things on their parts respectively covenanted to be done and performed, except that during a period of twenty days from August 5 to August 25, and a period of twenty-five and a half days from

9 November 8 to December 4, your petitioners did not keep the said vessel tight, staunch, and strong, and the United States did not and would not pay the agreed daily hire for said periods.

And your petitioners further show that, during the periods aforesaid, they were ready and willing and offered to keep the said vessel tight, staunch, and strong, and would have done so, but were prevented by the United States, as hereinafter stated; and your petitioners claim from the United States the sum of $8,302 37, being the amount of the daily hire of said steamship for 45½ days, as agreed by the charter-party; which amout has been withheld by the United States.

And your petitioners further show that, on or about the 24th day of July, 1865, the said steamer Tappahannock being, in pursuance of said charter, at Brazos St. Iago, Texas, and being there in the condition required by said charter-party, was loaded by Capt. J. E. Scott, the quartermaster of the United States Army at that place, being the proper officer of the United States to act in that behalf, with detachment of troops, and with animals and stores destined for Corpus Christi and Indianola and Galveston, and by his order was taken in tow by a tow-boat of the United States, in charge of a pilot in the service of the United States, and towed to sea over the bar at the mouth of the bay; and in passing over the bar the said vessel grounded, whereby her machinery was greatly damaged; but under the convoy, and with the aid of another steamer, she performed the service required, and was then ordered to New Orleans, where she was repaired; the said repairing occupying the periods of 20 and 25½ days, respectively, which have been before referred to.

That, before the said quartermaster ordered and caused the said steamship to be towed over the bar, as heretofore stated, both he and the United States pilot well knew the depth of the water on the bar was insufficient to float the steamship so loaded as she then was, and that she would necessarily strike and suffer damage in crossing the bar,

10 but the necessity for moving the troops, animals, and stores was such, as in the judgment of the said quartermaster, and such as in fact justified him in ordering her upon the service in question, notwithstanding the known risk.

And your petitioners further show to your honors that, at the time when the said steamer was damaged, as hereinbefore stated, she was in the service of the United States, under the charter aforesaid, and subject to the orders of the quartermaster of the United States at Brazos, and under the exclusive control of the United States quartermaster and pilot, and attached to a tow-boat of the United States, and the claimant's and their agents had no control over her; and they are advised and claim that, under the circumstances herein set forth, the United States are liable, upon an implied contract, as well as upon the written charter-party aforesaid, to reimburse the claimants for the cost of the repairs of said vessel, and to pay them for the loss of time.

And your petitioners further show that, when the said steamer arrived at New Orleans, as hereinbefore stated, the quartermaster of the United States at that place caused her to be repaired under the supervision of the superintending engineer of transportation of the United States at that place, and the expense of said repairs amounted to $7,106 20, and was paid by your petitioners; and the said steamer was, while undergoing said repairs, detained during the two periods of 20 and 25½ days, and during the said periods your petitioners kept the said steamer well and sufficiently manned, victualed, tackled, apparelled, and ballasted, and furnished, and in every respect fit for merchants' ser-

vice, and incurred all the expenses they would have incurred had the steamship been in active service, and that a reasonable demurrage for her detention would not have been less than the rate of hire stipulated in the charter-party, to wit, $182 25 cents per day.

11 Your petitioners further show that they promptly applied to the Quartermaster Department, being the proper department to ask in that behalf, for payment of the expenses of said repairs, amounting to $7,106 20, and the per diem of $182 25 for the time occupied in said repairs, amounting to $8,302 37, making in all $15,408 52, and the Quartermaster General acted upon and transmitted the claim to the Auditor, in substance recommending the allowance of the actual expenses of repairs, and, in lieu of per diem, 33 per cent. on the appraised value of the vessel. The Auditor concurred in his view, and reported the claim to the Comptroller, recommending the allowonce upon that basis of "about $9,365 80." The Comptroller allowed a portion of the expenses of repairs, and allowed, also, "the running expenses while laid up for repairs," but rejected the claim for per diem, as being for "a marine tort," and under this decision the claimant received the sum of $6,564 26; all of which will more fully appear by reference to copies of the official reports hereto annexed, marked Exhibits B 1, B 2, B 3, B 4, B 5.

And your petitioners claim in this suit the sum of $8,844 31, being the difference between the amount of the original claim of $15,408 57, and the amount paid, $6,564 26.

And your petitioners further show that, on or about the 6th day of July, A. D. 1866, the said Comstock sold and assigned to George Rhinehart all his (the said Comstock's) interest in the said steamship, including all debts due to her owners on account of her services or otherwise.

And your petitioners further show that, in the month of February, A. D. 1867, the said Thomas P. Morgan and George Rhinehart, finding themselves unable to meet their obligations, assigned all their property, rights, credits, and effects unto Robert P. Dodge and George F. McLellan, upon trust for the benefit of their creditors.

And your petitioners further show, they and the said Rhinehart,

12 Dodge, and McLellan, have at all times borne true allegiance to the Government of the United States, and that neither of them has ever given any aid, counsel, or encouragement to rebellion against the said Government.

THO'S P. MORGAN.

DISTRICT OF COLUMBIA,
*County of Washington, ss:*

On this 30th day of January, A. D. 1869, before the undersigned, a commissioner of the Court of Claims, personally appeared Thomas P. Morgan, one of the claimants named in the foregoing petition, and signed the same, and made oath according to law that no assignment or transfer of the claim stated in the said petition, or of any part thereof, or any interest therein, has been made, except as in the said petition stated; that the claimants are justly entitled to recover the amount therein claimed from the United States, after deducting all just credits and offsets, and that he believes the facts as stated in the said petition to be true.

Given under my hand and seal this 30th day of January, 1869.

[SEAL.] EDM'D F. BROWN,
*Commissioner of the Court of Claims.*

13 In the Court of Claims.

THOMAS P. MORGAN, ERWIN G. COMSTOCK, Lester D. Fuller, Clement L. Hughes, and Geo. L. Savage
*vs.*
THE UNITED STATES. } 3707.

And now, to wit, eleventh of April, A. D. 1870, the court, upon due consideration of the premises, find in favor of the *claimant*, and do order, adjudge, and decree that the said claimants take nothing by their suit, and that their petition be dismissed. *dollars cents.*

By the court:
A true copy of record.

14 In the Court of Claims. Dec. term, 1869.

THOMAS P. MORGAN, ERWIN G. COMSTOCK, Lester D. Fuller, Clement L. Hughes, and George L. Savage
*vs.*
THE UNITED STATES. } 3707.

And now come the claimants, by their att'ys, and make application for an appeal to the Supreme Court of the United States from the judgment rendered in the above-entitled cause in this court, April 11, 1870.

CHIPMAN, HOSMER & CO.,
*Atty's for Claimants.*

Filed May 2, 1870, in the clerk's office.

Ordered that the appeal as prayed in the case aforesaid, 3707, be allowed.

By the court.
MAY 2, 1870.

15 In the Court of Claims.

THOMAS P. MORGAN
*vs.*
THE UNITED STATES. } No. 3707.

The finding of facts and the conclusions of law on said facts on which the court founded its judgment.

This cause coming on to be heard the 11th day of April, 1870, before all of the judges of the Court of Claims, the said court finds as matters of fact—

That the claimants have at all times borne true allegiance to the Government of the United States, and that they have not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the said Government.

That the United States made with the claimant the contract contained in the charter-party set forth in the petition.

That under the said charter-party the claimant's vessel was, in July, 1865, at Brazos St. Iago, Texas, and was, by the quartermaster there, being the duly authorized agent of the United States, ordered to receive on board certain troops and stores, and to proceed as soon as this was done to New Orleans, Louisiana.

That the bar at the mouth of the harbor of Brazos is difficult and dangerous, and when the said vessel was ready to proceed on the voyage so ordered, the wind was high and the water on the bar was low,
16 and the quartermaster, being informed of the difficulty, ordered a tug-boat to aid in taking the vessel over the bar, and in tow of this tug-boat and in charge of a pilot in the service of the United States the said vessel proceeded to the bar and attempted to cross, but struck, and the hawser of the tow having parted, the vessel swung round inside the bar and returned to the landing. In this attempt she received injuries which, if time could have been allowed, could have been repaired in two days, and at a cost of five or six hundred dollars.

The said quartermaster again ordered the said vessel to proceed to sea; that this order was given with a full knowledge of the danger of crossing the bar, and against the judgment of both the master of the vessel and the pilot; but the exigencies of the service, in the judgment of the quartermaster, required the attempt to be made.

That the master of the vessel, under the said order of the said quartermaster, again attempted to cross the bar in tow of the steam-tug, and under charge of the Government pilot, as before, but struck heavily and was finally dragged over the bar by the tug, aided by her own steam-power. In this attempt she sustained such damage that she was compelled to use her steam-pump to save her from sinking, and the
17 troops and stores being discharged, she was towed to New Orleans by a Government transport.

That the repair of the said damages so as aforesaid sustained in crossing the bar amounted to and cost $6,890 80, of which the Government paid $4,283 20, and refused to pay any further part thereof.

That the said vessel was laid up and detained in making said repairs in all 45½ days, for which time the per diem allowance stipulated in the charter-party at $182 25, amounted to $8,292 37, of which the Government paid $2,281 06, as wages and board of the master and crew who were employed in aiding in the repairs of the vessel; and refused to pay any further amount on account of the said per diem.

By the court.

(Indorsed:) 3707. Thomas P. Morgan et al. vs. the United States.

18 In the Court of Claims.

THOMAS P. MORGAN ET AL.
*vs.*
THE UNITED STATES. } No. 3707.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the counsel for claimants for the allowance of an appeal, as filed in the clerk's office May 2, 1870, and of the order of the court May 2, 1870, allowing the same; of the findings of fact & conclusions of law on said facts, on which the court founded its judgment.

13 In the Court of Claims.

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THOMAS P. MORGAN
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That the United States made with the claimant the contract contained in the charter-party set forth in the petition.

That under the said charter-party the claimant's vessel was, in July, 1865, at Brazos St. Iago, Texas, and was, by the quartermaster there, being the duly authorized agent of the United States, ordered to receive on board certain troops and stores, and to proceed as soon as this was done to New Orleans, Louisiana.

That the bar at the mouth of the harbor of Brazos is difficult and dangerous, and when the said vessel was ready to proceed on the voyage so ordered, the wind was high and the water on the bar was low,
16 and the quartermaster, being informed of the difficulty, ordered a tug-boat to aid in taking the vessel over the bar, and in tow of this tug-boat and in charge of a pilot in the service of the United States the said vessel proceeded to the bar and attempted to cross, but struck, and the hawser of the tow having parted, the vessel swung round inside the bar and returned to the landing. In this attempt she received injuries which, if time could have been allowed, could have been repaired in two days, and at a cost of five or six hundred dollars.

The said quartermaster again ordered the said vessel to proceed to sea; that this order was given with a full knowledge of the danger of crossing the bar, and against the judgment of both the master of the vessel and the pilot; but the exigencies of the service, in the judgment of the quartermaster, required the attempt to be made.

That the master of the vessel, under the said order of the said quartermaster, again attempted to cross the bar in tow of the steam-tug, and under charge of the Government pilot, as before, but struck heavily and was finally dragged over the bar by the tug, aided by her own steam-power. In this attempt she sustained such damage that she was compelled to use her steam-pump to save her from sinking, and the
17 troops and stores being discharged, she was towed to New Orleans by a Government transport.

That the repair of the said damages so as aforesaid sustained in crossing the bar amounted to and cost $6,890 80, of which the Government paid $4,283 20, and refused to pay any further part thereof.

That the said vessel was laid up and detained in making said repairs in all 45½ days, for which time the per diem allowance stipulated in the charter-party at $182 25, amounted to $8,292 37, of which the Government paid $2,281 06, as wages and board of the master and crew who were employed in aiding in the repairs of the vessel; and refused to pay any further amount on account of the said per diem.

By the court.

(Indorsed:) 3707. Thomas P. Morgan et al. vs. the United States.

18 In the Court of Claims.

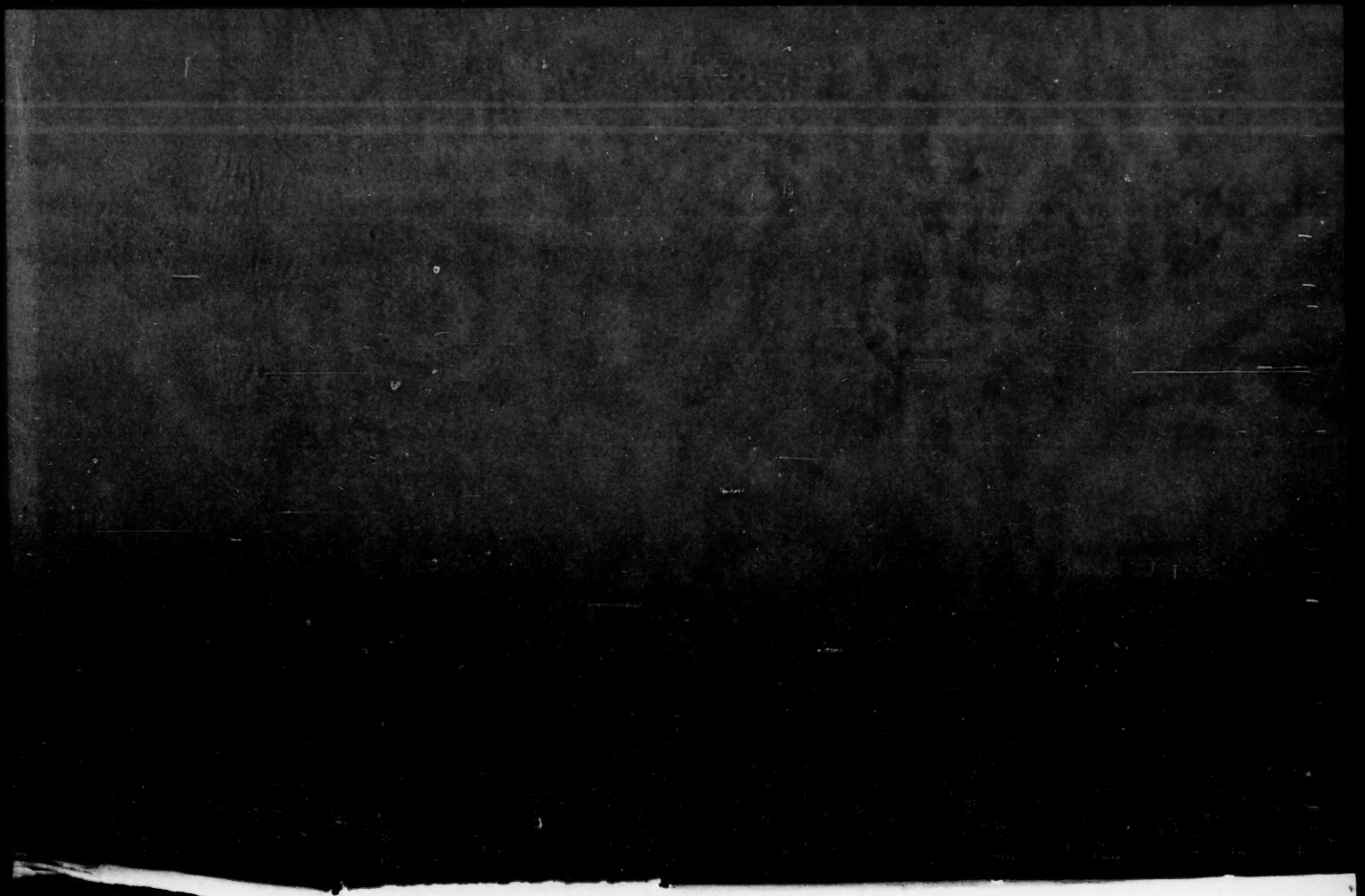
THOMAS P. MORGAN ET AL.
*vs.*
THE UNITED STATES. } No. 3707.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the counsel for claimants for the allowance of an appeal, as filed in the clerk's office May 2, 1870, and of the order of the court May 2, 1870, allowing the same; of the findings of fact & conclusions of law on said facts, on which the court founded its judgment.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this 20th day of December, 1870.

[SEAL.] JOHN RANDOLPH,
*Ass't Clerk Court of Claims.*

(Indorsement on cover:) No. 441. Thomas P. Morgan, appellant, vs. the United States. Court of Claims. Filed 22d December, 1870.



# Supreme Court of the United States.

DECEMBER TERM, 1871.

MORGAN ET AL.
*vs.*
THE UNITED STATES. } No. 225.

This is an appeal from the Court of Claims.

*The Case,*

according to the facts found by the court, is thus:

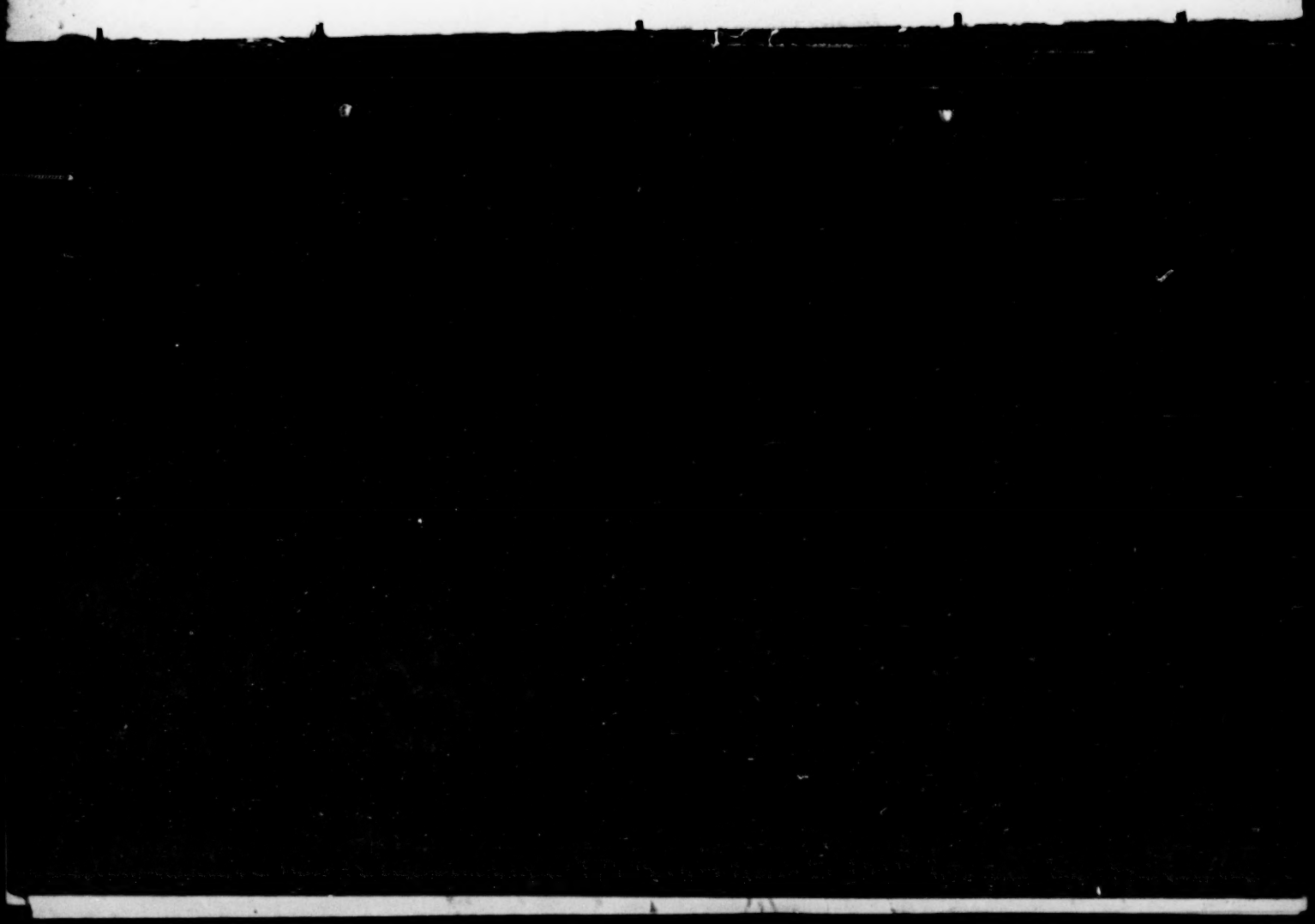
The appellants hired, on the 1st of March, 1865, a vessel to the United States by a charter-party set forth in the record. P.

The material terms are these:

The owners were to keep the vessel tight, staunch, manned, victualled, and appareled, and fit for merchant service.

The United States were to pay them $182.25 per day, except for time lost in consequence of the failure of the claimants to perform their covenant next above.

The United States were to employ the vessel and pay the per diem "until the said vessel is returned to the said party of the first part, in Philadelphia, in the same order as when received, ordinary wear and tear, damage by the elements, collision at sea or in port, bursting of boilers, and breakage of machinery excepted." The charter was to continue in use as long as the War Department required the vessel. Record, p. 4, made part of the finding at p. 9.



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The owners were to bear the marine risks.

The United States were to bear the war risk.

The vessel being at Brazos St. Iago, Texas, under this charter, was ordered by the United States quartermaster there, to put to sea. She was in charge of a Government pilot, and was towed by a Government tug. On the first attempt it was found that the water in the bar was too shallow to float the vessel; she struck; the tow line parted; and after sustaining some damage she returned to her landing. Then, against the judgment of the master and pilot, and with a full knowledge of the danger, the quartermaster required the attempt to be renewed, the exigency of the service, in his judgment, justifying the order.

The attempt was renewed in obedience to this order, and the vessel was dragged over the bar, sustaining such injuries as cost $6,890.80 to repair, and 45½ days of time were occupied in repairs, in which time a per diem of $8,292.37 accrued. The government paid $4,283.20 of the repairs, and $2,281.06 of the per diem, being the amount of wages and board of master and crew, who were employed on the repairs of the vessel.

The court rule that the Government was not liable to pay any more.

*Assignment of Error.*

The court erred in holding that the United States was not liable for the whole amount of the per diem and repairs; and that the United States was not liable to pay any more than they had paid.

*Points.*

I. Under the terms of the charter-party the United States were, *pro hac vice*, the owners of the vessel.

Trinity House *vs.* Clark, 4 M. & S., 288.

Belcher *vs.* Capper, 4 M. & G., 502, 541.

Newberry *vs.* Colvin, 7 Bing., 190.

Same case; 1 Clark & Fin., 283, 297.

Morgan et al *vs.* The U. S., 5 Ct. Cl., 182, 190.

Lander *vs.* Clarke, 1 Hall, 355.

II. The United States were bound to pay the per diem unless the owners were in default.

It is true the owners did not keep the vessel staunch and tight during all the time. But this they did in part, and as to part were prevented from doing by the act of the United States, and their failure cannot be set up to bar their action.

1 Ch. Pl., 358.

Young *vs.* Preston, 4 Cr., 239.

III. As for the expense of repairs the liability rests upon the ground of the use made of the vessel, beyond that stipulated for in the charter-party. But this is a small item. The United States paid for repairs

| | |
|---|---|
| dtrectly..... | $4,283 20 |
| And wages and board of officers and crew engaged in making repairs..... | 2,281 06 |
| If this sum, | $6,564 26 |

be charged to repairs, as it should be, it would leave $326.54 only due for repairs. It was considered at the Treasury as per diem, but is not chargeable to that head.

*Conclusion.*

We submit that the case should be remanded with direction to enter a judgment for

| | |
|---|---|
| Per diem, 45½ days at $182.25..... | $8,292 37 |
| Balance due on repairs..... | 326 54 |
| | $8,618 91 |

Or if it be concluded that the injuries sustained on the first attempt should be borne by the owners, then from the above sum should be deducted the amount of that

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| Balance due on repairs | 326 54 |
| | $8,618 91 |

Or if it be concluded that the injuries sustained on the first attempt should be borne by the owners, then from the above sum should be deducted the amount of that

damage, found by the Court of Claims, viz.,

| | |
|---|---|
| 2 days for repairs, at $182 25 | $364 50 |
| Cost of repairs | 600 00 |
| | $964 50 |

And judgment should be entered for..... $7,654 41

J. M. CARLISLE,
J. D. McPHERSON,
N. P. CHIPMAN,
*for Appellants.*

# In the Supreme Court of the United States.

DECEMBER TERM, 1871.

THOMAS P. MORGAN AND ANOTHER
vs.
THE UNITED STATES.
No. 225.

BRIEF FOR THE UNITED STATES.

# In the Supreme Court of the United States.

DECEMBER TERM, 1871.

THOMAS P. MORGAN AND ANOTHER
*vs.*
THE UNITED STATES.
} No. 225.

## BRIEF FOR THE UNITED STATES.

# In the Supreme Court of the United States.

DECEMBER TERM, 1871.

THOMAS P. MORGAN AND ANOTHER
*vs.*
THE UNITED STATES. } No. 225.

## BRIEF FOR THE UNITED STATES.

### STATEMENT.

The claimants chartered the steamer "Tappahannock" to the Government under a charter-party, which provided that the war risk was to be borne by the United States and the marine risk by the owners. The said steamer was in July, 1865, under the said charter-party, at Brazos Santiago, Texas, and was ordered by the quartermaster to receive on board certain troops and stores, and to proceed, as soon as this was done, to New Orleans. The bar at the mouth of the harbor of Brazos is difficult and dangerous, and when the steamer was ready to proceed on the voyage the wind was high and the water was low, and the quartermaster ordered a tug-boat to aid in taking the steamer over the bar, and in tow of this tug-boat, and in charge of a pilot of the United States, the said vessel proceeded to the bar and attempted to cross, but struck, and received such damage that she was compelled to use her steam-pump to save her from sinking, and received injuries, to re-

cover which this suit was brought. The order of the quartermaster was given under the exigencies of the service, with the full knowledge of the danger of passing the bar, and against the judgment of both the master and pilot.

ARGUMENT.

Under the charter-party in this case, the Government insured the owner against the war risk, and without any stipulation the marine risk would be borne by the owner of the vessel, as the Government were not the owners for the voyage, and would not be responsible therefor. The fact that these two phrases are in juxtaposition in the contract, limits the responsibility of the Government strictly to losses arising from the circumstance of its being engaged in war, and of the vessel's being engaged in the military service.

Such being the case, it is submitted that it is not difficult to decide within which class of perils the peril falls, which caused the injuries in this case. The fact that the Government was at war had no more to do with the loss than that it may have created the exigency which compelled the vessel to proceed to sea at all hazards; and such an exigency of the public service might have required a vessel, chartered as this was, to proceed to sea, notwithstanding the state of the wind and tide, if the Government had been at peace. It was, at most, only the remote cause of the loss, and cannot therefore be considered by the court. This being a marine risk, the loss occasioned by it must be borne by the owner, notwithstanding that the vessel was ordered by the quartermaster to proceed to sea.

Reed *vs.* The United States, 11 Wallace, 591.

The case of the claimant rests solely upon the contract of affreightment. If, contrary to that contract, the vessel was compelled to proceed to sea, under circumstances which were not justifiable, either the action of the Government officers was tortious, or else it was an appropriation of the vessel by the Government; and in neither case can any action be maintained in the Court of Claims.

United States *vs.* Kimball, 13 Wallace, 636.

C. H. HILL,

*Assistant Attorney General.*

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